

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES E. ROE,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. 2:13-CV-01744-JCC-BAT

**REPORT AND
RECOMMENDATION**

Charles Roe appeals the ALJ's written decision finding him not disabled. The ALJ found Mr. Roe's severe impairments were congestive heart failure and diabetes uncomplicated type II; these impairments did not meet the Listings; Mr. Roe had the Residual Functional Capacity ("RFC") to perform light work subject to certain limitations; and that he could not perform past relevant work but was not disabled because he could perform other jobs in the national economy. Tr. 13-23. After the ALJ issued her decision, Mr. Roe requested Appeals Council review and submitted an evaluation prepared by Oscar J. Brisino, Jr., M.D. Tr. 670. The Appeals Council added Dr. Brisino's evaluation to the record, Tr. 8, and denied review, Tr. 5, making the ALJ's decision is the Commissioner's final decision.

1 Mr. Roe contends the case should be remanded for further proceedings for two reasons.¹
 2 First, he argues the Commissioner erred by failing to give clear and convincing reasons to reject
 3 Dr. Brisino's opinion, and Dr. Brisino's opinion undermines the ALJ's findings regarding his
 4 RFC and ability to perform other jobs in the national economy. Second, he contends the ALJ
 5 failed to provide clear and convincing reasons to discount his testimony. Dkt. 17 at 1-2. He has
 6 not assigned error to the ALJ's assessment of the medical and lay evidence, or the ALJ's step
 7 two and three determinations that Mr. Roe did not have any mental health conditions that were
 8 severe impairments or which met the requirements of the Listings.

9 As discussed below, the Court recommends the case be **REVERSED** and **REMANDED**
 10 for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

11 **DISCUSSION**

12 **A. Dr. Brisino's post hearing opinions undermine the ALJ's decision**

13 After the ALJ issued her written decision, Mr. Roe sought Appeals Council review and
 14 submitted a "medical source statement" completed by Oscar Brisino, M.D. The Appeals Council
 15 made Dr. Brisino's statement part of the record and denied review. When a claimant submits
 16 evidence for the first time to the Appeals Council, which considers that evidence in denying the
 17 review of the ALJ's decision, the new evidence is part of the administrative record, which the
 18 district court must consider in determining whether the Commissioner's decision is supported by
 19 substantial evidence. *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F. 3d 1157, 1159 (9th Cir.
 20 2012).

21 The Commissioner contends the new evidence does not undermine the ALJ's decision
 22 arguing the ALJ properly evaluated Mr. Roe's credibility and the medical evidence that was

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¹ Dkt. 17 at 20.

1 presented to the ALJ. Dkt. 18 at 12-15. The contention is flawed because Dr. Brisino's post
2 hearing opinions noted new limitations the ALJ did not address. Specifically, Dr. Brisino opined
3 that due to almost daily "angina episodes," Mr. Roe needed to rest 5 to 10 minutes per episode.
4 Tr. 679. He further opined Mr. Roe would sometimes need one to four unscheduled breaks
5 during the workday, for 10 to 20 minutes per break. Tr. 671. These limitations undermine the
6 ALJ's finding that Mr. Roe was not disabled because the ALJ did not address them and the
7 vocational expert testified that a worker who needed three unscheduled 10 minute breaks a day
8 would not be employable. Tr. 82-83.

9 The Commissioner also argues Dr. Brisino's opinions are not sufficiently clear to compel
10 reversal of the ALJ's decision. Dkt. 18 at 15-17. The ALJ did not assess Dr. Brisino's
11 opinions, and the Commissioner's argument thus requires the Court to consider and weigh the
12 evidence in the first instance, something the Court cannot do. *Cf. Thomas v. Barnhart*, 278 F.3d
13 947, 954 (9th Cir. 2002). The ALJ is responsible for determining credibility, resolving conflicts
14 in medical testimony, and resolving all other ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
15 1039 (9th Cir. 1995). Hence, it is for the ALJ to resolve, on remand, with further development
16 of the record if necessary, not for the Court in this appeal. *See e.g. Tonapetyan v. Halter*, 242
17 F.3d 1144, 1150 (9th Cir. 2001). In sum, because Dr. Brisino's post-hearing opinions
18 undermine the ALJ's decision, the case should be remanded for further proceedings.² The Court
19 notes that the fact Dr. Brisino's opinions call for remand does not mean that they should be

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21 ² Because the matter should be remanded, the Court need not extensively discuss Mr. Roe's
22 failed arguments that the "Commissioner" failed to provide clear and convincing reasons to
23 reject the post hearing opinions. Dkt. 17 at 14; Dkt. 19 at 2-3. The Appeals Council need
explain why it denied review the ALJ's decision. *See Taylor v. Comm'r of Soc. Sec.*, 659 F.3d
1228, 1231 (9th Cir. 2011). As such, neither does the Commissioner because any explanation
given at this point would be post-hoc and impermissible.

1 credited as true, as Mr. Roe suggests. Dkt. 17 at 19-20. That determination is reserved to the
2 ALJ and must still be addressed by the ALJ on remand.

3 **B. The ALJ gave a least one proper reason to discount Mr. Roe's credibility**

4 Mr. Roe contends the ALJ erroneously discounted his testimony. Dkt. 17 at 14. The ALJ
5 did not find malingering and was thus required to provide clear and convincing reasons to
6 discount Mr. Roe's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). The
7 ALJ first discounted Mr. Roe's credibility because he was "not entirely compliant with adhering
8 to recommended treatment. Tr. 19. Specifically, the ALJ found Mr. Roe was advised to stop
9 smoking and maintain a diet and portion control but nonetheless "ate when he was hungry at all
10 times of the day or night," and continued to smoke. *Id.* The ALJ concluded Mr. Roe's
11 noncompliance raised questions about his motivation, and that his "failure to follow through with
12 treatment recommendations suggests that the claimant's conditions is not as severe as alleged."
13 *Id.*

14 In general, inadequately explained failure to seek treatment or follow a prescribed course
15 of treatment is proper grounds to question a claimant's credibility. *See Fair v. Bowen*, 885 F.2d
16 597, 603 (9th Cir. 1989). However, under Social Security Ruling 82-59, the "SSA may make a
17 determination that an individual has failed to follow prescribed treatment" only where the record
18 establishes the existence of four conditions. SSR 82-59 ("Identifying 'Failure' as an Issue.").
19 The fourth condition is "[t]he evidence of record [must] disclose[] that there has been refusal to
20 follow prescribed treatment." SSR 82-59. Substantial evidence does not support a finding that
21 Mr. Roe refused to follow prescribed treatment.

22 The record shows Mr. Roe suffers from diabetes and congestive heart failure and that his
23 health providers "stressed diet change," Tr. 578, Tr. 582 (discussed sugar levels, patient has

1 stopped eating top ramen), Tr. 618 (eating healthier), and Tr. 619 (discussed carbohydrates and
 2 eating top ramen), and the need to stop smoking. *See e.g.*, Tr. 636 (It is encouraging that Mr.
 3 Roe has reduced his smoking “however, did reiterate the importance of complete cessation.”).
 4 Tr. 636. The record shows Mr. Roe struggled with his diet and smoking and made attempts to
 5 follow-through with his doctors’ advice. However, it does not show that he refused to follow
 6 prescribed medical treatment; accordingly the ALJ erred in relying on diet and smoking to
 7 discount Mr. Roe’s credibility.³

8 The ALJ also found the medical evidence undercut Mr. Roe’s claim that he was disabled.
 9 Tr. 19-22. An ALJ may consider “ordinary techniques of credibility evaluation” including
 10 inconsistencies between a claimant’s testimony and the opinions of physicians concerning the
 11 nature, severity, and effect of the symptoms of which claimant complains. *Smolen v. Chater*, 80
 12 F.3d 1273, 1284 (9th Cir. 1996). Here, the ALJ detailed the medical evidence, Tr. 19-22, and
 13 concluded that it showed that though Mr. Roe’s medical conditions limited his capacity to
 14 perform work, he retained the capacity to perform limited work. Mr. Roe has not assigned error
 15 to the ALJ’s assessment of the medical evidence that was of record at the time the ALJ issued
 16 her written decision. Among the opinions the ALJ considered was William Spence’s, M.D.,
 17 testimony which the ALJ accorded significant weight. Tr. 21. Dr. Spence opined Mr. Roe “has
 18 a lot of symptoms,” Tr. 49, and was “capable of doing well, minimum sedentary type of

19 ³ The Court notes it is unclear whether an ALJ may rely on smoking as grounds to discount a
 20 claimant’s credibility. *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th
 21 Cir.2009) (citing *Shramek v. Apfel*, 226 F.3d 809, 812–13 (7th Cir.2000) (noting, in dicta, that
 22 nicotine’s addictive properties made it “extremely tenuous” to discredit a claimant’s description
 23 of her impairments based on the claimant’s continued smoking). Assuming smoking bears on a
 claimant’s credibility, the record does not support the ALJ’s reliance on smoking. The record
 shows Mr. Roe went from smoking two packs a day to smoking a couple of cigarettes “every so
 often.” Tr. 636. Given nicotine’s addictive nature, this shows Mr. Roe made great efforts at
 curtailing his nicotine use, behavior that tends to bolster rather than diminish his credibility.

activities.” Tr. 51. This opinion is substantial evidence supporting the ALJ’s finding that Mr. Roe’s testimony he could not work at all should be discounted as inconsistent with the medical evidence.

Although the ALJ’s treatment of Mr. Roe’s credibility is not error free, the Court finds any error would not negate the validity of the overall credibility determination and thus is harmless. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (including an erroneous reason among other reasons to discount a claimant’s credibility does not negate the validity of the overall credibility determination and is at most harmless error where an ALJ provides other reasons that are supported by substantial evidence). In sum, the Court affirms the ALJ’s credibility determination.

CONCLUSION

For the foregoing reasons, the Court recommends **REVERSING** the Commissioner’s final decision and the **REMANDING** the matter for further administrative proceedings pursuant to sentence four. On remand, the ALJ should assess the post hearing opinions of Dr. Brisino, develop the record as appropriate, reassess Mr. Roe’s RFC as necessary and proceed to the remaining steps as needed.

A proposed order accompanies this Report and Recommendation. Any objection to this Report and Recommendation must be filed and served no later than **May 14, 2014**. If no objections are filed, the Clerk should note the matter for **May 16, 2014** as ready for the Court’s consideration. If objections are filed, any response is due within 14 days after being served with the objections. A party filing an objection must note the matter for the Court’s consideration 14 days from the date the objection is filed and served.

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